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"An Analysis of Regional Solicitors' Attitudes to, and the use of, Mediation."

Abstract

Since the Woolf Reforms of the civil justice system, mediation has had an important role to play in the UK legal framework. The legal climate since the legal aid reforms as well as increased court fees has once again placed mediation and alternative dispute resolution into the spotlight. Yet, mediation is still underused and undervalued in the majority of legal disputes. This study develops the research undertaken into the views and attitudes to mediation of solicitors practicing in Canterbury, Kent. The report begins with a literature review of important research in this field. It then goes on to analyse the responses of fourteen solicitors who were interviewed for this study from the wider Kent region, from both the family and commercial sectors, with regard to their perceived advantages, disadvantages and personal views on mediation. The findings broadly matched those of the Canterbury study although there were some differences. Overall, mediation was viewed positively by practitioners although there were various concerns on circumstances where mediation would be inappropriate.

Literature Review

Mediation has a long history within its general parameters as the intervention of a third party to a dispute. Mediation has been at the forefront and epicentre of many different legal systems: the ancient Greeks, Romans, Confucians and Buddhists to name a few.¹ However, in the United Kingdom mediation has risen to prominence only very recently in what is a more adversarial and litigious legal framework. Mediation is a form of Alternative Dispute Resolution (ADR), which generally seeks to find a mechanism for the resolution of disputes without court adjudication. A reliable definition of mediation can be found within the ADR Handbook as involving 'the use of a neutral third party who seeks to facilitate what is essentially a negotiation process to resolve a dispute' and as a process that relies upon the consent of the parties.²

Mediation itself has varying degrees of differentiation, and each mediator will lie on a spectrum between evaluative and facilitative, depending on what style and skills they use at the mediation.³ These different styles are not generally recognised in the UK as having an effect on the mediation process, except by those who are very familiar with it. Generally, a facilitative mediator will intervene less to preserve impartiality and the process is entirely dependent on the parties. On the other hand, an evaluative mediator may be more willing to offer suggestions or integrate legal and social norms into the process to ensure parties achieve a fair settlement. There are other styles of mediation, such as the transformative method that focuses on underlying relationships and has a therapeutic nature.⁴ Empirical research has identified over twenty categories of strategies which often overlap with each other but with different goals and mechanisms.⁵ Mediation itself has suffered in this regard from a lack of guidelines or code of practice for the style of mediator and also from an inability to differentiate itself from solicitor negotiation and round-table meetings.⁶

The civil justice system as we now know it was reformed in the period leading up to and after the Woolf Report (1996). This began with the Courts and Legal Services Act 1990, which sought to reform what was viewed as an inefficient and wasteful system. Further reforms developed through the introduction of the Civil Procedure Rules and the Access to Justice Act, both of which emphasised the role ADR has to play in civil justice.⁷ Part 1 of the Family Law Act 1996 is a historical

¹ Christopher W Moore, *The Mediation Process* (3rd edn, Jossey-Bass 2003) 20-22.

² Susan Blake and Julie Browne and Stuart Sime, *The Jackson ADR Handbook* (Oxford University Press 2013) 15; Christopher W Moore, *The Mediation Process* (3rd edn, Jossey-Bass 2003) 15.

³ Leonard L Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques, A Grid for the Perplexed' (1996) 1 *Harv Negot L Rev* 7.

⁴ Samuel J Imperati and David C Brownmiller and Dena Marshall, 'If Freud, Jung, Rogers, and Beck Were Mediators, Who Would the Parties Pick and What Are the Mediator's Obligations' (2007) 43 *Idaho L Rev* 643, 655.

⁵ James A Wall and Timothy C Dunne, 'Mediation Research: A Current Review' (2012) 28 *Negotiation Journal* 217.

⁶ Laurence Boulle, *Mediation Principles Process Practice* (2nd edn, LexisNexis Butterworths 2005).

⁷ Woolf Reforms 1995; Access to Justice Act 1996; Civil Procedure Rules 1998.

example of proposed sweeping reforms to the divorce process, with ADR central in any couple wishing to divorce. This was repealed before it was brought into force amid widespread criticism, unpopularity and unsuccessful pilot schemes.⁸ In terms of family law, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) removed it wholesale from the scope of legal aid, apart from limited exceptions and for entitlement to mediation. A further emphasis on mediation is found in the Children and Families Act 2014,⁹ which requires disputants to attend a Mediation, Information and Assessment Meeting (MIAM) before being allowed to proceed to court. Forcing parties to at least consider mediation in such proceedings has once again brought mediation back to the forefront of family law, although there is comment that the requirement to attend a MIAM has not been consistently enforced.¹⁰

The creation of an Overriding Objective in both civil and family proceedings has obliged both the courts and parties to deal with cases justly and at proportionate costs.¹¹ The emphasis on the court's duty to engage in active case management includes encouraging disputants to use ADR where appropriate.¹² The General Pre-Action Protocol Practice Direction also states that litigation should be a last resort and the parties must themselves consider settlement or alternative forms of dispute resolution where possible.¹³ The ability of the court to vary costs according to parties conduct has also proved to be a disincentive to lawyers avoiding the use of ADR.¹⁴ All of these have placed a greater prominence on the use of ADR in order to reduce litigation costs. In the more recent review by Lord Justice Jackson, it was proposed that there should be a serious campaign to alert the profession and the public on the benefits of ADR and the creation of an authoritative handbook on the topic.¹⁵

Alongside this, the judicial system itself has led the way in creating mediation schemes. In 2004 the National Mediation Helpline was set up by HMCTS to provide low-cost mediations to anyone in England and Wales; it was primarily aimed at the fast and multi-track disputes.¹⁶ Following a successful pilot in Manchester, the small-claims mediation scheme provides free mediations to anyone on the small-claims track and is another example of a scheme led by the judiciary which

⁸ Janet Walker 'FALnS-A New Approach for Family Lawyers?' (2004) 34 FL 580.

⁹ s 10.

¹⁰ Mary Banham-Hall, 'How to increase family mediation take-up' (2014) 44 FL 890.

¹¹ Civil Procedure Rules, Pt 1.

¹² *ibid* 1.4(2)(e) and Family Procedure Rules, Pt 1.4(2)(f).

¹³ General Pre-Action Protocol, para 8

¹⁴ Civil Procedure Rules 1998, Pt 44.

¹⁵ Jackson LJ, *Review of Civil Litigation Costs: Final Report* (TSO 2010) ch 36 and 468-69

¹⁶ HMCS, Civil Court Mediation Service Manual (Version 3, February 2009) < https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/civil_court_mediation_service_manual_v3_mar09.pdf > accessed 29/07/2015.

showcases the central nature mediation plays in reducing the burden on the courts.¹⁷ In civil hearings, court fees have been increased dramatically, which has forced people to consider alternate ways of resolving disputes other than litigation.¹⁸

Despite all of these reforms, however, recent research along with the statistics show that referrals to publicly funded mediation have dropped by 38 per cent in the year after LASPO was introduced.¹⁹ The changes made by the legislature and the judiciary compared to the drop in mediations suggests that there are still mixed attitudes and less awareness in some sectors. More recently, the Family Mediation Task Force identified several problems with mediation in the UK, including a lack of general awareness of the existence of legally aided mediations, epitomised by the drop in publicly funded mediations since the introduction of LASPO.²⁰

These problems are compounded by the current regulatory framework for mediation which does not have statutory backing. As many mediators are not solicitors, the Solicitors Regulation Authority does not regulate them and recent reports have found this model to be unsustainable and contributing to the lowered public awareness and confidence in mediation.²¹ The lack of integration into the legal framework has led to six different accountable bodies under the umbrella organisation of the Family Mediation Council²² and the Civil Mediation Council or Law Society for commercial mediators. However, these organisations have provided mediators with a common code of practice and a requirement for continuing professional development.²³

The encouragement to use ADR by the courts may be described as a 'carrot and stick' approach. The duty to further the overriding objective along with encouragement to use ADR found in the CPR encourage lawyers to consider it where possible. The force behind CPR 44.4 is strengthened by CPR 26.3, which also confers power on the court to stay proceedings for settlement by ADR. Attitudes of the judiciary also suggest support for ADR, such as Lord Dyson who stated 'all members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR'.²⁴ Lightman LJ stated in *Hurst* that 'mediation is not in law compulsory, but alternative dispute resolution is at the heart of today's civil justice system' and he stressed that

¹⁷ *ibid.*

¹⁸ Ministry of Justice, *Enhanced Court Fees* (Cm 8971, January 2015)

¹⁹ Committee of Public Accounts, *Implementing reforms to civil legal aid* (HC 2014-15, 808) para 2.

²⁰ Family Mediation Task Force, *Report of the Family Mediation Task Force* (Ministry of Justice, 2014) para 3.

²¹ *ibid* 71.

²² These are Resolution, the Family Mediators Association, National Family Mediation, the Law Society, the College of Mediators and ADRg.

²³ Stan Lester 'Professional organisation and self-regulation in family mediation in England and Wales : Part 1: background' (2014) 44 FL 1217.

²⁴ *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576.

it was for the judge to decide whether refusal to mediate was unreasonable.²⁵ Mediation was emphasised also in *Faidi & Anor v Elliot Corporation*²⁶ where it was suggested that such a process was particularly appropriate for neighbour dispute cases.

However, there is still distrust of mediation and ADR as a whole by many lawyers; this is an assertion that has been supported by research.²⁷ It has therefore become necessary to have a 'stick' for failing to make appropriate use of mediation, which is found in the power bestowed on the court to order adverse costs consequences. The court may penalise those who do not conduct their litigation in a professional manner, including those who unreasonably refuse to consider ADR. The current law on costs was a big theme in Hazel Genn's research on the mandatory use of mediation in the courts.²⁸ The laws on adverse costs consequences began with *Cowl*²⁹, followed by *Dunnett*,³⁰ where the court deprived a successful litigant from recovering costs due to an unreasonable refusal to mediate. *Halsey*, although not penalising the litigant in that case, outlined several factors that would constitute an unreasonable refusal: these included the nature of the dispute, merits of the case and whether costs or delay would have been disproportionate.³¹ Furthermore, it was recently clarified in the case of *Garritt-Critchley v Ronnan*³² that the proportionality of costs should be measured against the expense of the whole trial and not just the settlement figure. The court also commented on unsatisfactory reasons often used by lawyers to refuse to consider mediation.³³ Thus the case law shows that judicial attitudes to mediation have been softening and increasingly placing further relevance on the importance of mediation.

For example, Waksman J said in *Garritt-Critchley* that mediation was suitable for the vast majority of cases listed for hearing, and cited problems with solicitors misunderstanding or lacking confidence in the efficacy of mediation as a reason for continued distrust of the process.³⁴ This case also extended the finding of *PGF II SA v OMFS Company 1 Ltd*³⁵ that silence in the face of offers could constitute unreasonable refusal to mediate, when it ruled that simply responding promptly to the other side's invitations was not sufficient to show engagement with the process.³⁶ This recent judgment is an

²⁵ *Hurst v Leeming* [2002] EWHC 1051 (Ch).

²⁶ [2012] EWCA Civ 287.

²⁷ J Sidoli del Ceno "An investigation into lawyer attitudes towards the use of mediation in commercial property disputes in England and Wales" (2011) 3 International Journal of Law in the Built Environment 182.

²⁸ Professor Dame Hazel Genn and others *Twisting arms: court referred and court linked mediation under judicial pressure* (Ministry of Justice Research Series, 2007).

²⁹ *Cowl and Others v Plymouth City Council* [2001] EWCA Civ 1935.

³⁰ *Dunnett v Railtrack* [2002] EWCA Civ 302.

³¹ *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.

³² [2014] EWHC 1774 (Ch).

³³ *ibid* [14]-[27]

³⁴ *ibid*.

³⁵ [2013] EWCA Civ 1288

³⁶ *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.

endorsement of mediation and defines 'the stick' as being applicable in a great number of circumstances. Even where a successful party has a strong case this may still be insufficient to avoid adverse costs if there was a refusal to mediate: it also emphasises 'the carrot' in that there are many benefits to mediation in cases of animosity and where an independent perspective is needed.³⁷

There has, however, been resistance by the judiciary to make mediation mandatory. Although Lord Dyson commended mediation in *Halsey* for the place it has in the civil justice system, he also stressed that it was not for the courts to order or compel parties to mediate and questioned whether to do so may infringe disputants' rights under Article 6 of the Human Rights Act 1998.³⁸ Professor Hazel Genn was conducting her study on a mediation scheme at a London court at the time this decision came out and found that *Halsey* had a profound effect on her study through a drop in mediation referral acceptance rates.³⁹ Although the judiciary has supported ADR in general, it has been very reluctant to impinge on the public's right of access to the court.

The most recent considerable research conducted on civil mediation was by Professor Hazel Genn on two mediation referral schemes, one between 1996-98 and the other between 2004-05.⁴⁰ It found that solicitors had a profound impact on the success of mediation as their clients generally listened to their advice. If they viewed it as a 'bureaucratic hurdle' then it was generally the case that mediation either would not be taken up or would fail. Furthermore, perceptions of mediation were influenced by the outcome of the process, parties subject to failed mediations were more critical compared to those that settled at mediation. Failed mediations were mainly due to the behaviour of the opponent, such as intransigence or unwillingness to compromise, or that the mediator lacked the skills necessary, or that the time allocated was too short.⁴¹ Unsuccessful mediations were also likely to make the parties perceive that they had increased their costs by participating, compared to successful mediation where parties believed that they had saved costs.⁴² Other concerns highlighted in this report were a lack of understanding of mediation from legal professionals, utilising the correct timing and the influence of legal aid.

However, when correctly used, mediation can address the shortcomings in the formal structure of the court system and it has many key advantages over litigation. These include savings of cost, time

³⁷ Julian Sidoli del Ceno, 'Costs, mediation and the judiciary' (2015) 81 Arbitration 105.

³⁸ *Garritt-Critchley v Ronnan* [2014] EWHC 1774 (Ch) (Ch D).

³⁹ Professor Dame Hazel Genn and others *Twisting arms: court referred and court linked mediation under judicial pressure* (Ministry of Justice Research Series, 2007) 14-20.

⁴⁰ Professor Dame Hazel Genn and others *Twisting arms: court referred and court linked mediation under judicial pressure* (Ministry of Justice Research Series, 2007) 130.

⁴¹ *ibid.*

⁴² *ibid* 131.

and the ability to repair underlying relationships.⁴³ Etherton LJ observed that costs of litigation regularly outweigh the amount of settlement.⁴⁴ In the current legal climate, with less eligibility for legal aid and higher court fees, the saving of cost is a particularly relevant consideration. It is also a process reliant on the parties and therefore opens the possibility for outcomes 'quite beyond the power of lawyers and courts to achieve'.⁴⁵ Such outcomes could include an apology, specific performance or flexible childcare arrangements. Mediation also allows the parties to keep the line of communication open and see the other party face to face in a relatively informal environment. In the case of family proceedings, mediation may be especially important where the welfare of the child is involved as agreements are more likely to be amicable and followed if both the parties were involved in creating that settlement.⁴⁶

Avoiding the litigation forum may also stop the dispute from intensifying and save the parties, especially children, from what can be a traumatic experience giving evidence or being cross examined.⁴⁷ Mediation allows the parties to sit down and explore their underlying interests in a manner that a court is not able. Once shared and fundamental interests are identified, the parties are able to understand each other better, which paves the way for a mutually beneficial agreement. Through allowing a line of communication and exploring underlying interests, it allows the parties to empathise with each other and ultimately increases the likelihood of relationships remaining intact.

However, ADR is not always appropriate for every case such as those requiring legal precedent or fact finding from an adjudicator.⁴⁸ On the other hand, the case of *Royal Bank of Canada Trust Corporation v SS for Defence* held that refusing to mediate due to the desire to establish a point of law may not be justified, especially for government bodies.⁴⁹ There are also issues of power imbalance where one party is legally aided and the other is not. This is especially relevant in cases involving a controlling party in family law, where that person may refuse to mediate thus leaving the other disputant with no recourse except to self represent at court.⁵⁰ An unrepresented party against one with counsel at mediation also finds themselves an increased likelihood of inability to compose

⁴³ Susan Blake and Julie Browne and Stuart Sime, *The Jackson ADR Handbook* (Oxford University Press 2013) 15.

⁴⁴ *Newman v Framewood Manor Management Co Ltd* [2012] EWCA Civ 159.

⁴⁵ *Dunnett v Railtrack Plc* [2002] EWCA 3006 Civ 576 (Brooke LJ).

⁴⁶ James A Wall and Timothy C Dunne, 'Mediation Research: A Current Review' (2012) 28 *Negotiation Journal* 217, 232.

⁴⁷ Rosemary Hunter, 'Mapping Paths to Family Justice: Matching Parties, Cases and Processes' [2014] FL 1404.

⁴⁸ John Wade, 'Don't waste my time on negotiation and mediation: this dispute needs a judge' (2001) 18 *Mediation Quarterly* 259; Hunter (n) reports on need for adjudication in complex matters and those issues with which mediations cannot deal with.

⁴⁹ *Royal Bank of Canada Trust Corporation v SS for Defence* [2003] All ER 171 (Ch).

⁵⁰ Rosemary Hunter, 'Exploring the LASPO Gap' [2014] FL 660, 661.

a convincing legal narrative.⁵¹ Therefore, it is for legal professionals to carefully consider whether ADR is appropriate for the current case and whether it could put their clients at any disadvantage.

Australia has made increasing use of mediation in recent years. In family law, there has been a comprehensive shift to mediation through the establishment of 65 Family Relationship Centres run by non-governmental organisations on a not-for-profit basis.⁵² At these centres, mediations are provided for free and an attempt to mediate is mandatory unless there is an exemption. This process is micro managed through the co-operation of family mediators, solicitors, domestic abuse charities and the civil service. Such a progressive system has produced positive results, with an estimated 20 to 30 per cent of couples receiving help that they would not have had previously.⁵³ Australia has also seen a significant shift towards mediation in commercial disputes. Several pieces of legislation now allow the court to order parties to mediate, with or without their consent.⁵⁴ The parties are also sometimes under a requirement to produce a 'genuine steps' statement to detail what they have done to attempt to resolve the dispute prior to trial.⁵⁵ Whether this statement has been complied with or not, as well as unreasonably refusing to mediate, can have an effect on adverse cost consequences.⁵⁶ Furthermore, mediator accreditation is not compulsorily but can be achieved through the National Mediator Accreditation System. Many parallels can be made with the law of mediation in Australia with the UK, such as the requirement to attempt mediation in family law with the MIAM and the 'genuine steps' statement with the CPR. However it is more institutionalised and, unlike the UK, the courts may order parties to mediate.

New Zealand has placed a central role on mediation in family law with approximately 24-30 per cent of divorces making use of mediation.⁵⁷ Although mediation is not mandatory, any party could request a judge-led mediation through the Family Proceedings Act 1980 (New Zealand). More recently, privately trained mediators are able to conduct mediations inside the court although judges usually conduct them in more serious matters.⁵⁸ Parents divorcing must attend a Family Dispute Resolution service appointment alongside other courses, which are intended to bestow

⁵¹ Michael M Petterson and others, 'Representation disparities and impartiality: an empirical analysis of fear, preparation and satisfaction in divorce mediation when only one party has counsel' (2010) 48 Family Court Review 663.

⁵² Family Mediation Task Force, *Report of the Family Mediation Task Force* (Ministry of Justice, 2014) 35.

⁵³ *ibid* 36.

⁵⁴ Civil Law (Wrongs) Act 2002, s 195(1) (ACT); Civil Procedure Act 1970 (NSW), s 26(1); Supreme Court Rules (NT), s 103J; Supreme Court Act 1935 (SA), s 65(1); Supreme Court Rules (Vic), Chapter I, Rule 50.07; Rules of the Supreme Court 1971 (WA), Order 29.2(q) – (ra).

⁵⁵ Civil Dispute Resolution Act 2011, s6 (Australia).

⁵⁶ *Ibid* s 11-12' Civil Procedure Act 1970 (NSW) s18N(1)(a)(Australia).

⁵⁷ Family Mediation Task Force, *Report of the Family Mediation Task Force* (Ministry of Justice, 2014) 36.

⁵⁸ Safer Scotland Scottish Government, Making Justice Work Enabling Access to Justice Project- International literature review of Alternative Dispute Resolution (November 2014) <http://www.slab.org.uk/export/sites/default/common/documents/about_us/policy/AlternativeDisputeResolution/reformatted_Family_ADR_international_review_-_revised_Feb_2015.docx> accessed 20 July 2015.

knowledge to disputants on how to best manage their divorce. There are three separate bodies allowed to provide mediation services and practitioners are required to have five years of relevant experience.⁵⁹ Although there are provisions in over 60 statutes regulating the use of mediation, there is no general or mandatory position on the use of mediation in commercial disputes. The approach in New Zealand seems to have developed the Australian model and is quite far apart from the UK position.

Despite the progress and reforms that mediation has made both in the UK and in other jurisdictions, alternative dispute resolution as a whole faces many challenges. As highlighted in Genn's research, there are contradicting and conflicting views held by many legal professionals. Mediation offers significant benefits to many disputants demonstrated by the attitudes of the judiciary and the findings of research. Understanding how to best integrate mediation into our legal framework could offer improved outcomes for litigants across the UK, as demonstrated by the approaches in other jurisdictions.

⁵⁹ *ibid.*

Methodology

Topic of Research

“An analysis of regional solicitors’ attitudes to, and the use of, mediation”

This study leads on from a previous study conducted in 2014 which asked the same question, but which focused on solicitors in Canterbury. The purpose of this study was to analyse solicitors’ views in the rest of Kent by exploring meanings and perceptions on all aspects of mediations in order to compare them to the Canterbury study.

Methods Used

This was a qualitative study that made use of open questions to elicit descriptive responses from the solicitors involved. The interviewer used some general questions and then allowed the respondents to speak freely, with the interpretation and the analysis conducted by the researcher. Personal interviews were conducted where possible, but telephone interviews were used if the participants preferred. Forty-seven respondents who had not replied to me were followed up with a questionnaire from Survey Monkey, but unfortunately only two responses were elicited.

Sample

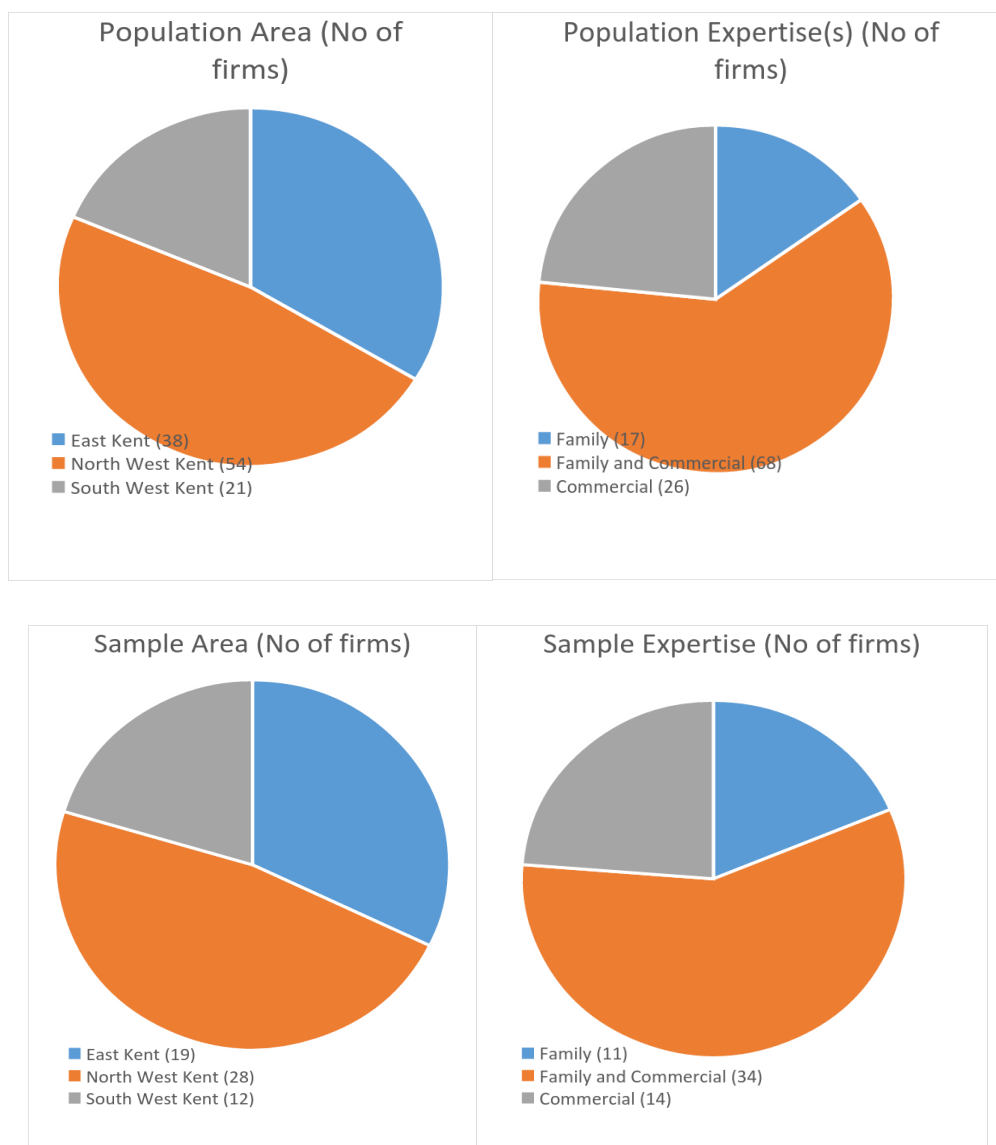
The population of the study was composed of the entirety of family or commercial solicitors in Kent apart from Canterbury. Although the previous study had included employment solicitors, this was not included in the current study due to changes in the process that have made conciliation with ACAS more prevalent and mediation less so.⁶⁰

Every solicitor practicing in the areas of private family law and civil/commercial litigation in Kent listed on the Law Society website was collated to form the study population. There were 111 firms in total, each ranging in number of solicitors and practice areas. Conveyancing solicitors were outside the scope of the population. Duplicates were sorted by the registered head office. Each firm was then sorted by areas of practice and size. These firms were sorted into the groups of East, North West and South West Kent by postcode grouping.⁶¹ The selected sample size was 60, in order to get the sample of 54 per cent of the population was selected on a distributional scale according to expertise and number of solicitors.

⁶⁰ Enterprise and Regulatory Reform Act 2013, Part 2 – Employment, Section 7, Sub-Section 1-3.

⁶¹ East Kent included the postcodes, North West Kent included the postcodes, South West Kent included the postcodes.

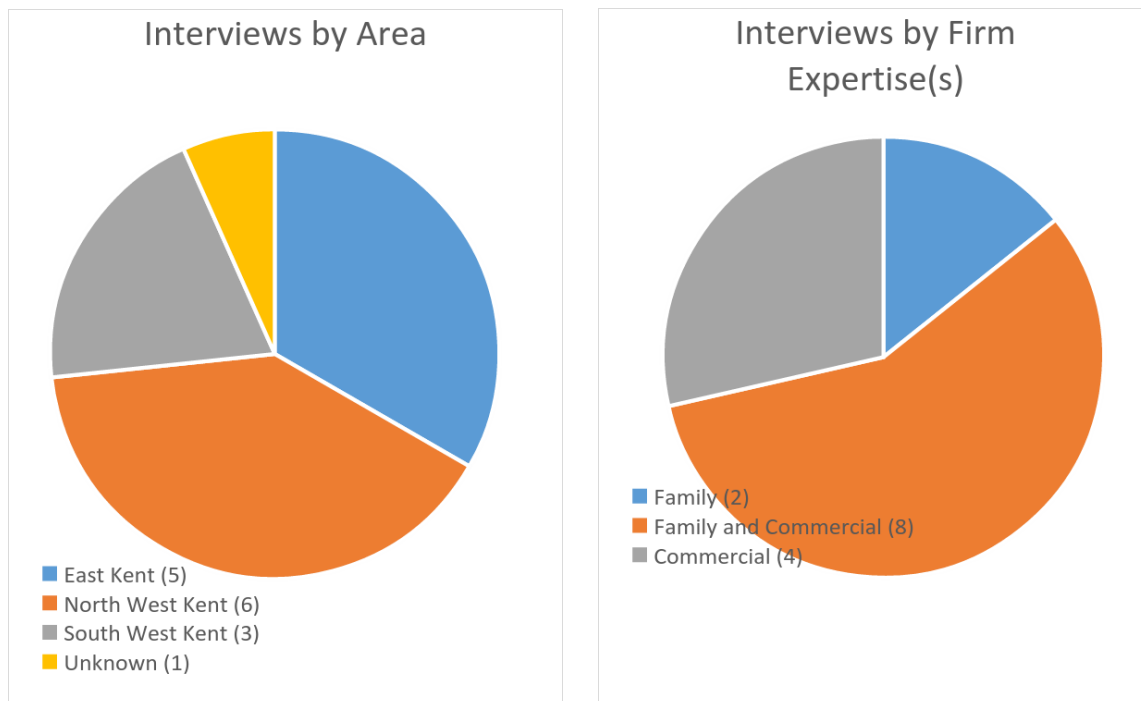
In order to identify the sample from the population, the population was sorted in groups according to number of solicitors: below five, between five, ten and over ten. They were then sorted by expertise according to commercial, family or mixed practice. Each firm within every subgroup (e.g. mixed expertise and between five to ten solicitors) was assigned a concurrent number in an Excel spreadsheet. Within each of these groups a random number generator (<https://www.random.org/>) was then used to create a number without bias; that number would then decide which firms would be picked to form part of the sample. If the random number generator gave the same number multiple times then a new one was generated until each number given was unique. This technique was used to identify the necessary sample size according to the requirements.



The sample size was 11 family firms, 34 with a mixed of expertise of family and commercial and 14 firms that only dealt with commercial or civil law. Nineteen were in East Kent, 28 in the North West of Kent and 12 in South West Kent.

A pilot study was carried out with Cathy O'Mahoney at Deal Mediation Services on the 2nd June 2015 to ensure that the survey generated results and the questions were appropriate. She had not been interviewed during the previous research and thus provided fresh and independent perspective on the questionnaire.

Responses



There were 10 family responses and four civil/commercial responses, perhaps reflecting the greater emphasis placed on family mediation in recent times, similar to the findings from the previous study focused in Canterbury. Fourteen solicitors engaged in a full interview. Fifteen firms were unwilling or unable to participate in the study. Six respondents were on holiday and upon return had increased workloads. The other 15 firms did not reply or return contact, which was frustrating as it left the researcher unsure whether participants were interested or too polite to refuse. One problem that emerged was inaccurate data on the Law Society website regarding areas of expertise, whereupon such firms were removed from the population and replaced. This process wasted valuable time and effort which could have been better utilised making contact with firms. On several occasions phone interviews were booked but cancelled last minute or the phone call was not answered. As the rest of Kent was less familiar with Canterbury Christ Church University and also less likely to use the university's mediation clinic, more barriers were faced in convincing the sample that this was a genuine study and not a marketing call. Although the response rate was less than expected, the data gathered from an almost 25 per cent response rate is a considerable proportion of family and commercial solicitors in Kent. The qualitative data was also very detailed and provided good insight

into practitioner views. It is therefore suggested that the sample response rate was enough to make the study meaningful and worthwhile.

Analysis

Introduction and the previous study

This study led on from a project last year that investigated the same topic, but which exclusively focused on the Canterbury area. The study had a population of 30 firms and had a response from 13 of those. Of the respondents expertise was mixed: seven specialised in family, four in civil or commercial and two in employment. The study concluded that the majority of solicitors were positive about mediation and felt that it had many advantages. Within the family respondents, there was some disquiet about the imposition of the MIAM. Within civil and commercial respondents there was a widely held belief that further integration of mediation into the CPR would be beneficial. The concerns held by participants mainly focused on the skill of the mediator and a key finding of this study was that there should be a uniform standard for the type of mediator in UK legal framework.

The aim of this research was therefore to analyse whether solicitors in the rest of Kent would be in concurrence with the findings of the Canterbury study. This was achieved through using the same questions, except for the addition of one question querying whether clients had come back to advise on positive or negative experiences. It is hoped that in this manner the findings of both studies are comparable.

Personal experience and understanding of the mediation process

There was a mixed range of mediation experience within all respondents. Six respondents (five family and one commercial) were trained mediators. Experience of conducting mediations was varied within those responses, similar to the respondents in the previous study. Two family respondents had trained over 15 years ago, one of whom often acted as a mediator. Another family respondent had trained more recently and was now regularly conducting mediations. The six respondents who were trained mediators emphasised the process as involving facilitation and explained that the purpose of the mediator was to guide the parties. Two of those said that the mediator does not give legal advice. Other areas of the mediation process mentioned regarding understanding of mediation by those who had greater experience as a mediator included transparency, confidentiality and management of the process by the mediator. Overall, the responses from those trained in mediation showed that they had retained a comprehensive understanding of mediation as a process and its role in the legal system

Of the remaining responses (eight), two commercial solicitors had experience of attending mediations. They mentioned the independence of the mediator and that settlement was dependent on parties. Six respondents (two commercial and four family) had no experience of mediation apart from dealing with clients who had attended mediations. Only two of those that did not have experience conducting or attending mediations mentioned independence or impartiality in the mediation process. The other four described the process as an opportunity to meet and a means of achieving settlement. The observation of the researcher would be that those not practising or attending mediations have a different level of knowledge to those who had some experience of mediation.

Overall, the understanding of the mediation process was accurate and matched the findings of the previous study in which participants described the process as involving the mediator as an independent and neutral facilitator. There was a minority of respondents in both the current and previous study that merely described the mechanical process of mediation in the manner of a round table meeting or solicitor negotiation. Further education or promotion of the process of mediation itself within the legal profession could be helpful in improving levels of knowledge and understanding regardless of personal experience levels.

Does mediation have an increased emphasis?

Ten family solicitors and two commercial solicitors believed that there is an increased emphasis on mediation. Three family solicitors cited the MIAM as a factor in that belief. One family and one commercial solicitor respondent cited court fees and overloaded courts as the reason, and one commercial as 'it's been forced by the Civil Procedure Rules'. Two were unsure, with one stating that upon moving to a new solicitors' firm there appeared to be less emphasis on mediation in that area. Two disagreed, with one commercial solicitor saying 'it's something you hear talked a lot but nothing ever really happens'.

The previous study had unanimous agreement among solicitors in Canterbury that mediation as a process had a greater emphasis. In contrast, in the current study 29 per cent of respondents were not sure or disagreed. This could simply be coincidental, or it could demonstrate there is a mixed perception on mediation's emphasis among legal professionals in the rest of Kent. A larger percentage of civil and commercial (50 per cent) compared to family (17 per cent) respondents were unsure or disagreed, suggesting that beliefs or doubts on an increased emphasis on mediation was less prevalent in the family sector. It could be that the MIAM has had an effect on solicitors' perceptions in this regard, while the CPR has had less of an effect.

Use of mediation service providers

One aim of this study was to gauge whether respondents used internal or external providers for mediation, and if external mediators are retained then what criteria is used to select them. Four family respondents had both internal and external providers. These solicitors would outsource to external clients in order to avoid conflicts of interest and to retain clients as legal ones. Lawyers cannot represent and mediate for the same client.⁶² Eight solicitors (six family and two commercial) outsourced only to external providers. A further two commercial solicitors had never used internal or external providers.

The criteria that solicitors used to select external mediators varied greatly. Three family respondents valued locality first and then expertise second. Relevant expertise was cited in eight of the twelve solicitors who had responded to this question. Legal experience was ranked highly with the majority (ten of twelve) of participants expressing a preference for lawyer mediators or legal expertise. Although relevant experience was important, that did not necessarily mean that solicitors wanted only legal experience in a mediator. One commercial and three family solicitors stated that the skills required depended on the types or nature of the dispute, an approach which is following other countries such as Canada to match mediators with relevant professionals dependent on the nature of the dispute.⁶³ Two of whom believed that where children were involved, or in cases of high-conflict disputes, mediators with therapeutic or social care backgrounds were desirable. Four family respondents were conscious of the costs perspective. One referred cases to non-legally trained mediators if they believed a mediation was unlikely to be successful in order to fulfil the MIAM requirements, due to it being cheaper. One commercial respondent stated that using a non-legal mediator was good to get the parties to step back and look at the claim from a different perspective, which was helpful in resolving the matter if positions had become entrenched. Locality for the client was mentioned by several respondents.

It was common practice for solicitors to give their clients a selection of mediators and leave it to them to choose who they had a rapport with. There was disagreement between the responses provided by two family respondents who gave conflicting answers, one saying that the choice of mediator would depend on the complexity of the case, while the other stated that complexity should never factor in as mediators should be able to deal with all issues. The responses to this aspect of the questionnaire demonstrated that the vast majority of solicitors valued legal knowledge in a mediator, but other factors were also important depending on the client's needs or resources.

⁶² Family Mediation Council, Code of Practice for Family Mediators (version 9.9.10), para 5.1.5 <
http://www.familymediationcouncil.org.uk/wp-content/uploads/2015/02/fmc_code_of_practice_100909.pdf>

⁶³ Family Mediation Task Force, *Report of the Family Mediation Task Force* (Ministry of Justice, 2014) para 75.

The previous study emphasised legal expertise and client choice in their decision on external mediators, as well as other factors such as mediators personally known to the solicitor. The mixed response to the values placed upon mediator skills in the current study does in part concur with the previous study in that lawyer-mediators were preferred. However there was no emphasis on other skills, such as therapy or social care, in the Canterbury study. Therefore, it could be said that the sample in the current study placed a greater value in non-traditional skills for certain situations.

Use of mediation

The sample surveyed were asked if they had recommended cases to be taken to mediation and, if so, how many in the past twelve months. One family respondent had recommended 70 cases for mediation, which amounted to nearly every single case they had dealt with. Five family respondents had recommended between ten and 20 in that time period. Three other family respondents had recommended between two to six in the same period. One family solicitor had recommended none. All four of the commercial respondents had not recommended a single case, although one had suggested it informally to clients.

This range suggests that family solicitors rely on mediation as a tool to varying degrees, a hypothesis that was supported by a range of comments such as 'it's always an option, to be continually reviewed' compared to 'sometimes I just explain it's a route'. The foremost belief may be due to the fact that the respondent was a trained mediator who conducted mediations full-time in addition to legal work as a solicitor. The responses to this part of the questionnaire also showed that commercial solicitors have less reliance or need to use mediation.

The previous study found that two respondents (one commercial and one family) sometimes recommended mediation and nine (three commercial and six family) often recommended mediation. Therefore in this study there was generally less reliance placed on mediation as five respondents had not recommended any cases and three had recommended less than six clients. This could perhaps reflect a change in the question to ask solicitors how many clients they had referred in the past 12 months whereas the previous study did not place a timescale on this question. It is therefore very difficult to make any more than very general comparisons on this point. However, what can be said is that commercial and civil solicitors made less use of mediation than family solicitors.

The overwhelming majority (ten of fourteen) said that clients always or generally accepted their recommendation to mediate. One commercial solicitor said that clients did not take it up, and two other commercial solicitors said that clients tended to go for joint settlement meetings rather than

mediations. This is consistent with the previous report that found client's followed their solicitor's recommendations in regards to mediation. The fact that clients accepted their solicitor's recommendations demonstrates the trust that clients place in legal professionals, a finding consistent with Genn's report.⁶⁴ Therefore a greater education to solicitors on the advantages of mediation as well as where it may assist their cases could be beneficial in increasing the use of mediation in England and Wales.

Personal and firms' views on mediation

Personal views of mediation were positive by the majority of solicitors. Eight family respondents and three commercial solicitors viewed mediation in a good light. Half of these were overwhelmingly positive and one family solicitor said it should form a greater part of the legal process and 'applied to as many areas as possible', although another viewed mediation as positive but believed it should not be made mandatory as clients would lose confidence in the system. That family solicitor also commented that there should be greater publicity about mediation and 'not just solicitors railroading people into mediation', a finding which is supported by research commissioned by the Ministry of Justice.⁶⁵ A major caveat of the 11 positive personal views, held by eight of them, was that it is helpful if you had the right people or the 'right ingredients', and that it 'was just not suitable' for certain disputants. Four family and two commercial respondents also stressed that litigation had its place and viewed other dispute resolution processes, such as arbitration and round-table meetings, as having an equally important role to play. Two family respondents were positive but also highlighted that the timing must be right for it to work. One family respondent was neutral and a commercial solicitor had no personal views.

Personal views were broadly in line with the previous study, which emphasised that mediation was not a 'one size fits all' solution or that it was sensible in the correct circumstances. The majority of respondents were also positive about mediation. The comparison on personal views between Kent and Canterbury show a largely positive attitude towards mediation and how it can be helpful.

There were mixed attitudes in the firms' views of mediation. Other than the respondents themselves three commercial and five family firms either did not have a view or were neutral to mediation. A common comment was that such discussion 'doesn't very often arise' or it was something they

⁶⁴ Professor Dame Hazel Genn and others *Twisting arms: court referred and court linked mediation under judicial pressure* (Ministry of Justice Research Series, 2007) 131.

⁶⁵ Bloch A and McLeod R and Toombs B, *Mediation information and assessment meetings (MIAMs) and mediation in private family law disputes* (Ministry of Justice Analytical Series, 2014).

never really thought or talked about. Thus, the majority of respondents didn't have a firm policy on the use of mediation but looked to the facts of each case in order to assess the suitability of mediation. Of the five positive responses, two firms outlined themselves as committed to mediation or made a lot of use of it and one family respondent believed it was necessary to make use of mediation other than in a real emergency.

The mixed attitudes in firms' views on mediation is in contrast to the previous study which found nearly all the respondents' firms had a positive view on mediation. Firm views in the current study also sometimes contradicted respondent's personal (and positive) views. It could be said that firms in this sample were generally less positive about mediation or simply did not have a view on the matter. However, solicitors' may have misinterpreted the firms' stance as mediation was a subject not discussed. Firms may benefit from having a policy on the use of mediation so that their employees understand the practice's view on mediation and promulgate that stance when discussing mediation with clients or other people.

Perceived positives of mediation

Participants' perceptions on the positives of mediation were gauged through three questions: what they perceived as advantages, reasons that they would recommend mediation, and enquiries into positive feedback from clients that had attempted mediation.

I. Perceived advantages of mediation

There was concurrence among the majority of respondents of what could be gained from mediation. These could be broadly split into practical and personal advantages. The majority of respondents cited mediation as being quicker and more cost efficient than litigation. These are well-known positives of mediation.⁶⁶ Four respondents (three family and one commercial) mentioned the slow and overloaded court system as an incentive to engage with mediation. Other practical advantages included it simplifying their job, reducing their workload for menial tasks and it being helpful if the legal position wasn't clear.

The majority of participants also stressed the interpersonal advantages of mediations. Especially so was the potential for mediation to heal or preserve on-going relationships where future communication would be needed between disputants. This was viewed as important where children are involved and as one respondent put it 'the court is unsuitable for many family disputes'. The potential for reduced hostility was also cited by respondents as mediation being 'less adversarial'

⁶⁶ David Spencer and Michael Brogan, *Mediation Law and Practice* (Cambridge University Press 2006) 84 – 87.

and 'more amicable'. A large minority of respondents also cited greater client input and involvement in the process as positive as the court may deliver an unfavourable decision. Allowing the parties to instead choose their own process gave them the opportunity to recognise mutual interests. Furthermore, two respondents described mediation as a chance to get their clients an apology, something said to be impossible to get from 'the mouth of a judge'.

Two commercial and one family solicitor also viewed mediation as an opportunity for the client and lawyer to communicate with the other party. In one case, mediation acted as a vehicle for witness appraisal and validation where, on paper, the client's story seemed unbelievable. Going to mediation and allowing the client the opportunity to tell her story in person allowed the opponents to 'appraise her credibility as a witness', thus changing their position and willingness to settle. In another commercial case the solicitor used the mediation as an opportunity for direct contact with the opponent to advocate their case and dissuade them from continuing litigation. So, although this advantage seems of personal benefit it has also been of tactical advantage to solicitors.

The emotive benefits of mediation were also mentioned by three family respondents. By allowing the parties to vent, it allows them to move on and assist the parties to see beyond the dispute. It was also discussed by two family respondents that solicitors can sometimes lack compassion or become so 'dogged' and intent on defending their clients that they miss the wider issues. By getting an independent person involved, several solicitors described it as having 'fresh eyes' which allowed the parties to view their dispute from a different perspective. Mediated resolutions were also described as generally better, with clients more likely to abide by the terms of an agreement they have negotiated themselves.

The perceived advantages of mediation were all in line with the previous study that found positives in speed, cost and interpersonal involvement. There were no major differences in findings and therefore the current and previous sample all had many positive things to say about mediation which related to practical and emotive benefits. This comparison suggests that solicitors in the whole of Kent and Canterbury had a strong understanding of how mediation may assist in certain disputes.

II. Reasons solicitors recommended mediation

The most commonly cited reason for recommending mediation, among both family and commercial solicitors, was that it provided an opportunity that would otherwise not have presented itself. Four family and three commercial respondents stressed the interpersonal benefits of mediation as a reason to recommend it. That included the opportunity to meet the opponent, the opponent's

counsel, to understand the others' point of view, to allow emotional venting, to settle amicably and to maintain working relationships. In this regard mediation was viewed as a holistic or 'whole' way of dealing with disputes compared to other forms of dispute resolution or litigation. Solicitors overwhelmingly recognised these opportunities as indicators mediation could be useful in some form.

Eight solicitors (six family and two commercial) identified a cost saving in following the mediation pathway and would recommend it where they believed money could be saved. This was either through avoiding litigation with limited assets, which would lead to disproportionate costs, or through not engaging in work that would be expensive and menial for a solicitor, such as dividing relatively low-value matrimonial property in a financial remedies case.

Many solicitors also viewed mediation as most likely to succeed if there was one issue to resolve and the parties were not too far apart. Where there was a sticking point on one matter, for example finances, but the parties could resolve matters concerning the children then solicitors were more inclined to recommend mediation. Such a view suggests that the participants' believed mediation needed some form of goodwill between the parties. If the whole 'factual matrix' of the dispute was being questioned then mediation was not viewed as a useful tool. This is an agreement with the previous study that found perceived advantages or factors indicating mediation could be recommended had to be balanced against whether they thought the parties could reach an agreement sensibly.

Three family respondents mentioned cases involving children as a good chance to use mediation to resolve that. That supports the theories behind mediation that seeks to identify underlying shared interests, something that was well recognised by the sample.⁶⁷ Two commercial solicitors mentioned neighbour disputes as suitable for mediation, as the fundamental issue is the relationship between the neighbours. One mentioned that even if a client wins such a case at court their 'life could be made hell' unless they repaired that relationship. On the other hand, one of those participants mentioned a residential dispute that involved the client being locked out of the house. In that circumstance court action was needed urgently and mediation would have delayed matters.

Three family solicitors mentioned the MIAM as a factor for their increased referral to mediation. Four family respondents would recommend mediation where parties' positions were not too far apart and there was one aspect or 'sticking point' that needed resolution. On the contrary, one commercial and one family participant believed that mediation was helpful if parties were a long

⁶⁷ KG Allred, 'Relationship Dynamic Disputes' in Michael L Moffitt and Robert C Bordone (eds), *The Handbook of Dispute Resolution* (Jossey-Bass 2005).

distance apart or in stalemate position, as a mediator could provide an independent and fresh perspective. One family and one commercial solicitor believed that they would recommend mediation for most neighbour disputes. Other factors mentioned included saving time (one family and one commercial solicitor), if the matter was of low complexity (one family), if litigation would be stressful or to gain something unavailable from a court order.

III. Positive client feedback

This was a new question that did not feature in the previous study. This part will explore positive responses and negative answers will be explored further on in the report. It asked whether clients had returned to solicitors with positive or negative feedback after attending mediation and the reason for the view. Client feedback was mainly positive; of the 13 out the 15 respondents who had heard back from clients, nine said that clients feedback was mainly positive.

Two family and two commercial solicitors said that clients felt a sense of relief or viewed mediation as procuring a good outcome. One family and one commercial respondent said that clients quoted speed as a factor in viewing mediation favourably. Two different commercial and family respondents cited narrowing of issues even if matters weren't fully settled as positive client feedback. Two further family respondents also cited clients as believing the process led to less conflict and hostility than would have occurred at litigation. Two family and one commercial respondent said that client feedback was neutral or that they had mixed feedback during their time as a solicitor. A further two family respondents said that the majority of clients viewed mediation as negative; this was mainly due to the problems with the mediator or the mediation service provider. Overall, the mostly positive client feedback suggested clients gained from mediation, with some negative feedback mostly due to poor mediator skills.

Perceived negatives of mediations

This study sought to gauge perceived problems with mediation by asking what the disadvantages of mediation would be, why mediation has not been taken up after it was recommended and to ask whether clients have come back with negative feedback. These three questions generated good data on perceived faults with the process. Pitfalls with mediation can generally be divided into issues either relating to the process itself, the mediator, the parties or the referring solicitors.

I. Perceived disadvantages of mediation

The majority of family solicitors described that a major problem with mediation was getting parties into the same room, especially if it is a high-conflict dispute. The vast majority of family respondents

said that a main reason that mediations failed was because parties couldn't get into the same room together. In one case, such a scenario was said to intensify the dispute and was described as an unpleasant experience. Although it is hoped that parties can sit in the same room together, and that is indeed normally the aim, mediations can be fully conducted via separate rooms; this is also known as shuttle mediations.⁶⁸ Indeed, in the Canterbury study some solicitors responded that shuttle mediations were a useful tool when considering mediation with difficult parties. Shuttle mediations were only mentioned in the current study by one family respondent as being able to 'sometimes work'. Whether the perceived problem of getting parties into the 'same room' and little mention of shuttle mediations was due to the mediation provider not providing such mediations or whether the referring solicitors were unaware of this was unclear.

Other problems with the process itself revealed by some responses to the questionnaire included a perception of increased cost, a problem that was identified in Hazel Genn's report.⁶⁹ This was communicated as unexpected or disproportionate costs according to the value of assets in dispute. In one case described by a family solicitor, costs rose dramatically because the mediation overran. It was described as a terrible and traumatic experience for that client. Disproportionate costs were mentioned by three commercial (75 per cent) and two family (25 per cent) solicitors, suggesting that the value of the claim has more of an effect on the viability of mediations in commercial cases. Commercial solicitors expressed a preference for 'mediating without the mediator', joint settlement meetings and solicitor negotiation, instead preserving the use of mediation for suitable cases. Increased costs was only mentioned by two solicitors in the Canterbury study, suggesting that the current sample had more concern for wasted costs with mediation than the previous project.

A minority of solicitors viewed the requirement to attend MIAM as affecting perceptions on mediation of the general public. One solicitor suggested that forcing the MIAM can make parties perceive there will be unequal bargaining positions, another suggested when a MIAM is enforced then the process won't work. The same solicitor mentioned that the MIAM is not uniformly enforced by the courts, although more so in financial cases, a comment that is supported by research.⁷⁰ The majority of family respondents cited the MIAM in some way during the interview and attitudes were mixed. That there was such a mix in perceptions is in agreement with the finding from research in 2014 that there should be increased throughput on mediation through public-facing communication, clearer upfront communication on the MIAM process, acknowledging variation in mediators

⁶⁸ David A Hoffman, 'Mediation and the art of shuttle diplomacy' (2011) 27 *Negotiation Journal* 263.

⁶⁹ Parkinson L, 'Co-mediation on family matters: cost-effective or unaffordable?' (2013) 43 *FL* 467.

⁷⁰ Mary Banham-Hall, 'How to increase family mediation take-up' (2014) 44 *FL* 890.

approach and assessing clients effectively.⁷¹ This perceived fault with the MIAM echoes the previous study which had considerable and similar disquiet on this issue.

II. Reasons did not recommend mediation

Reasons parties would not recommend mediation overwhelmingly focused on the parties' behaviour. Eight family respondents cited a concern that their client was a domestic violence victim or vulnerable in some way, citing control or a fear that their client would be unable to make themselves heard. Two commercial and one family respondent mentioned a belief that the parties' behaviour would destroy the process such as unreasonable demands or preconditions or if the 'opponent is hell-bent on litigation'. Two family participants cited a high complexity case as a reason not to recommend mediation. These concerns were also expressed in the previous study which found vulnerability, such as domestic abuse, and power imbalance as factors discouraging a recommendation to mediate.

III. Negative client feedback

The majority of family respondents (six) viewed the mediator themselves as a major flaw in the process and a reason for failed mediations. Three family respondents reported that clients had come back to them after mediation with reports that the mediator had been unfair and taken sides. On the other hand, a different family respondent believed that the problem was the reverse and that clients had a problem with the mediator being neutral as they were not used to that. Backing up this point, a different family respondent viewed the problem as mediators not getting involved and allowing the parties to 'get on with it' without any guidance. That respondent also expressed dissatisfaction and a 'lack of faith' with certain mediation providers, instead preferring well established mediators and barristers chambers that do mediation. This juxtaposition represents the conflicting styles of mediation, facilitative and evaluative, as described by Riskin.⁷² This finding is concurrent with the previous study in that there is ambivalence or lack of awareness of different mediator styles. There is currently no agreed guidelines or standard practice when it comes to this matter. This provides useful flexibility when selecting a mediator, as said by one respondent who liked to mix expertise when selecting mediators to tailor a solution for the client. That is of true practical advantage, but greater awareness both in the public and the legal profession of the different styles may alleviate concerns or surprises people get when engaging with the process.

⁷¹ Bloch A and McLeod R and Toombs B, *Mediation information and assessment meetings (MIAMs) and mediation in private family law disputes* (Ministry of Justice Analytical Series, 2014) 3-4.

⁷² Leonard L Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques, A Grid for the Perplexed' (1996) 1 Harv Negot L Rev 7.

One family respondent said that the mediator had allowed the process to become a platform for a controlling party to abuse the other. This once again represents contrasting styles of the facilitative, which tends not to interfere to preserve impartiality, and the evaluative which may provide more direction for the parties to a mediation as described above. Another described a client in a financial remedies matter who viewed the mediator as too therapeutic and 'more interested in opening up sore wounds' than reaching a settlement. Such an approach may be of the 'transformative' style, which seeks to explore underlying emotional and interpersonal issues, and may not have been appropriate in the case which was purely financial.⁷³ These responses highlight real issues with the current legal framework for mediation in the UK, a framework which can lead to a misleading view of mediators and the correct level of involvement in the process.

Three respondents also said that mediations had failed due to the mediator lacking the relevant expertise. This manifested itself in the mediator 'shying away from complex issues', being incompetent in children matters or not taking in facts and circumstances described by the parties. These deficits in expertise may relate to different or inappropriate styles or lack of training and knowledge of the disputed area. One solicitor suggested that many trained mediators in the past had to only do half a day's course in order to become an accredited mediator, thus lacking up-to-date and proper knowledge. The Canterbury study also found that negative views of mediation outcomes also related to a lack of legal expertise in the mediator, which had led to non-lawyer mediators incorporating unusual terms into mediated agreements. This showed that, in respondents' experiences, the success or advantages of mediation related to the level of legal knowledge of the mediator. What is unique in this study is that other skills were also emphasised alongside legal expertise. However, comparisons of the current and the previous study do show that a legally trained mediator is normally important to solicitors.

Discussions pertaining to procedural problems related to the mediator or their provider. These included delays in follow up appointments, lack of follow-up care and ill-timed requests for documentation. The delays could enormously frustrate the process and cancellations were described by one participant as psychologically harmful for clients who had prepared themselves for appointments only to have them cancelled. These problems were not mentioned by solicitors in the previous study, possibly reflecting better quality of mediation service providers in the Canterbury area.

⁷³ Samuel J Imperati and David C Brownmiller and Dena Marshall, 'If Freud, Jung, Rogers, and Beck Were Mediators, Who Would the Parties Pick and What Are the Mediator's Obligations' (2007) 43 Idaho L Rev 643, 655.

Timing was another major concern. Nearly all participants in the study considered that getting the correct timing for mediation was crucial. Intervening too early meant emotions were still raw; intervening too late and positions had become entrenched or too much money had been spent. In one case a mediator requested documents too early. This related to a divorcing client who, still in shock at the recentness of their partner's revelations, was left traumatised by a pre-appointment call from the mediator requesting documentation for relevant rehousing. This brought home the enormity of the life-changing effects the divorce would create, and the solicitor described it as traumatic for the client; it led to the breakdown of mediation. Although the mediator may have erred in that circumstance, it was a reasonable mistake to make due to a lack of standard and widespread guidelines on best practice. The lack of follow-up care was described by one respondent as frustrating, as clients seemed abandoned between sessions, and that respondent described little emphasis on working together by certain mediators.

Destructive and unhelpful behaviour among solicitors was described, some intentional and some not. Several participants mentioned that solicitors view the MIAM as simply a procedural step to get a court application. One participant described that as frustrating and unhelpful for the process. They suggested a renaming of the MIAM to another term. Thus it is now also known as an 'intake session'; it was said that those clients contacting for a MIAM were less likely to be serious about mediation while those enquiring after an 'intake session' were more interested in trying mediation as a process. This was echoed in other responses which suggested that solicitors nor the public do not fully understand what the MIAM entails and its purpose. Several participants described the participants as lacking understanding of the process. Such insight may mean greater publicity is needed within the general public or some form of awareness and training for those in the legal profession.

Other unhelpful behaviour mentioned by one family and one commercial respondent was that mediation has been used as a delay tactic. In another instance, the opposing solicitor sent an aggressive letter to the client during the mediation itself. That caused positions to become entrenched and mediation to ultimately fail. Other notable concerns included solicitors trying to undo what was agreed at mediation after the event. It was also noted that solicitors, nor mediators, sometimes did not explain the process well enough. Such actions may represent devalued opinions of the usefulness of mediation, or distrust of the process.

A widespread concern for respondents concerned the nature of the parties themselves, which centred around issues of controlling behaviour or domestic abuse. Nine out of ten family respondents cited these as a weakness of mediation or an indicator it would fail. Respondents said

that mediation was not useful in such circumstances and expressed the desire to protect their client. The majority viewed power imbalances within a relationship as likely to continue at mediation, although one respondent expressed the view that if it was a one-off incident or less serious than mediation was still a possibility to explore. If the dispute was protracted, mediation was viewed as not useful and mentioned by one respondent as being able to intensify the dispute. Domestic abuse provides an automatic exemption from the MIAM, but in instances of controlling behaviour solicitors expressed a strong reluctance to go anywhere near mediation. Furthermore, one solicitor had in the past requested exemptions despite not falling into the domestic violence category, and had them accepted by the court. Power imbalance and domestic abuse was also cited by the majority of respondents in the Canterbury study as a downside of mediation. Thus this area is a real concern that has been absorbed well by the profession. There is little chance that solicitors would refer unsuitable cases like these to mediation, unless the abuse was well hidden or historic. These findings match the Canterbury study in which the majority of solicitors would not use mediation if there was domestic abuse or controlling parties.

Other problems originating from the disputants themselves included that they didn't believe in the process or they didn't agree with it. It was concurrent among respondents that if parties didn't come with an open mind or a willingness to agree, then mediation would not work. Parties must themselves want to resolve an issue at mediation, as the whole process is disputant-led and reliant on parties moving the mediation forward. There was a general consensus that mediation couldn't go ahead if parties couldn't agree on basic facts or did not want to agree on a solution. Stubborn and unreasonable personalities was mentioned as contributing to this problem. Many solicitors mentioned the issue of parties coming to the mediation with unreasonable demands or preconditions, a factor which was expressed as likely leading to failed mediations. It was stressed by several solicitors that parties must be working from the same agenda or have some level of mutual trust and understanding. Clients not willing or able to agree was mentioned by the majority of solicitors in the Canterbury study and is therefore a tangible problem with the ability to make use of mediation.

One solicitor described clients losing interest in the process after finding out it is generally not binding. This led to them perceiving it as a 'waste of time and money', a finding which is backed up by another respondent suggesting that some clients prefer the legal process as that is what they are used to and they are unwilling or unable to take part in a process which requires their involvement. It was said that a minority of clients preferred a lawyer to argue their case.

Conclusion

This study sought to gauge the views and attitudes of solicitors in the Kent region to mediation through a series of probing questions in order to make comparisons to the previous study. The data gleaned was thorough and insightful in many ways and was broadly similar to the findings in the Canterbury study. It paints a picture of mediation as being applied more in family law than in commercial law, but with significant benefits in both areas. Some of the significant findings from the previous study included the confusion over differing mediator styles, disquiet over the imposition of the MIAM and a push for further integration of mediation into the Civil Procedure Rules (CPR). There were, however, differences with the previous study and disagreements on some points.

The understanding of the mediation process was thorough and matched the previous study, although those solicitors with less experience of conducting or attending mediations were more likely to understand the practical side of referring clients to mediation rather than the theories behind the process. In concurrence with the previous study, the majority of solicitors believed that mediation had an increased emphasis. Although a minority, and majority of civil or commercial solicitors, disagreed or were unsure. This point was surprising as the protocols in the Civil Procedure rules, the case law on adverse costs consequences and the imposition of the MIAM has given mediation increasing attention in recent years. **It is recommended that there is a campaign of 'inward' education of legal professionals of the process of mediation, and ADR as a whole, in line with the conclusions of other reports.**⁷⁴

There was mixed amount of referrals to mediation in this study, with the majority of respondents referring less than six or none in the past twelve months. This is generally less than the previous study but could reflect a change in the question that placed a timescale rather than leaving the question open. It is hard therefore to say for certain whether less reliance is placed upon mediation in the rest of Kent. What can be said is that the majority of respondents in both the current and previous study stated that their clients overwhelmingly accepted recommendations to mediate. **A greater awareness of the benefits of mediation within the legal profession could translate to greater public use of the process.** In line with the previous recommendation, greater education of solicitors could be of real benefit to mediation in the UK.

Personal views of mediation matched the Canterbury study in that they were broadly positive and emphasised that mediation could not be applied in every case. The suitability of the process depended on individual circumstances and situations. Both the previous study and the current

⁷⁴ Family Mediation Task Force, *Report of the Family Mediation Task Force* (Ministry of Justice, 2014) para 32.

emphasised that other dispute resolution and litigation had its place and should not be disregarded. Mediation had to be the correct choice and the 'right ingredients' must be present for mediation to even be considered by solicitors. **A system of triage, whether by solicitors or via the court system, that could best match cases to certain dispute resolution processes may be helpful in assisting solicitors to decide when to refer clients to mediation.**

Solicitors placed many of the same values in criteria used when selecting mediators as in the Canterbury study. These mainly focused on legal expertise as it was perceived settlements mediated by a legal professional were more realistic and easier to convert into a legal order. However, in contrast to the previous study many solicitors also placed value on non-traditional skills: these included therapeutic, social work or other backgrounds. Such an approach matches the Canadian model, which incorporates several sectors working together to best match client circumstances with the correct mediator.⁷⁵ Solicitors would not ordinarily go for a non-lawyer mediator, but many felt that they were useful in protracted or difficult disputes by helping the parties to get a fresh perspective.

The comparison of personal views between the Kent and Canterbury studies both displayed a largely positive attitude towards mediation and how it can be helpful. In contrast, firms' views in the current study were mixed with some significant neutral or negative views. This could suggest that solicitors were unaware of the firm's policy on mediation or that there was no widely held view. **It is suggested that solicitors' firms should have general guidance on best practice on mediation and ADR so that their solicitors understand what the position of the firm is and how they should regard dispute resolution in their day-to-day work.**

The perceived advantages of mediation were either of practical or interpersonal benefit. Practical benefits included saving time and cost. These were concurrent with the Canterbury study and are widely regarded as the bastions of mediation. Solicitors also regarded mediations as simplifying their jobs and allowing for possibly menial work to be done by mediators. In the Canterbury study, negative views were held about the Mediation Information and Assessment Meeting (MIAM)⁷⁶, with considerable disquiet on the mandatory nature of the policy. There was very little negative comment in the current study, which could suggest that this sample was more positive on that matter or in the year that has passed views have cooled. Overall, the MIAM was viewed rather positively with most family solicitors viewing it as assisting them in their roles.

⁷⁵ Family Mediation Task Force, *Report of the Family Mediation Task Force* (Ministry of Justice, 2014) 75.

⁷⁶ Children and Families Act 2014, s 10.

Getting an independent perspective on the case through a mediator allowed 'fresh eyes' to look at the case anew, something which respondents described as helpful in cases that had been ongoing for some time. Significantly, mediation also acted as an opportunity to attain or achieve something that would not otherwise be possible. Although this was mostly of interpersonal benefit, such as getting an apology or allowing emotional venting, it also practically assisted solicitors by allowing them to persuade the opponents on the strength of their case. In one case this was through witness appraisal and another respondent described directly dissuading the other party from continuing proceedings at the mediation. There was comprehensive understanding of the advantages of mediation in this study and no recommendations are made.

Perceived negatives of mediation centred around mediator styles. Echoing the previous study, there were many complaints about mediators either taking the wrong approach, being too interventionist or not intervening enough. Such a dichotomy of opinions on correct mediator approach demonstrates the lack of uniform standard for mediators in the UK. Although different mediation styles are useful and allow flexibility when choosing a mediator, it has led to confusion with clients and solicitors having different ideas on what the process entails. In agreement with the previous study, **it is recommended that uniform standards of mediator are created that can be clearly explained to solicitors and clients so they can choose and understand fully the differences in styles.**

Other negative opinions on the usefulness of mediation included where the parties' behaviour was unreasonable. For example, getting the parties into the same room was cited as a common reason that mediations failed. It is possible that some solicitors are not fully aware of the shuttle mediation process that could benefit such clients. Furthermore, the majority of solicitors cited controlling parties or domestic abuse as a red flag to avoid mediation. It was well understood that parties could use the mediation as a platform to continue with their controlling or bullying behaviour. Getting the correct timing was also a significant concern for solicitors, something that could have a profound impact on the success or failure of mediation.

Procedurally, problems with mediation were cited with service providers who provided a poor service with cancelled appointments, delays between meetings or a lack of preparation and follow up care. These were significant and were sometimes described as psychologically harmful or traumatic for clients. It is important that mediation service providers prove themselves to be a useful service; otherwise solicitors and the public lose confidence in them and are less likely to consider ADR in the future. **All mediators should engage in some form of pre-meeting contact and**

be fully prepared for the first meeting in order to demonstrate to parties that the process is efficient and useful.

There was also concern about cost-efficiency, with solicitors viewing failed mediations as likely to increase costs. The majority of commercial solicitors expressed a preference for joint settlement meetings unless the value of the dispute was high or acrimonious, a finding which is concurrent with the Canterbury study.

Appendix A- Sample list

Respondents

Mowll Ltd, Trafalgar House, Gordon Road, Whitfield, Dover, Kent, CT16 3PN
Bowers & Jessup, 134a Sandgate Rd, Folkestone, Kent, CT20 2BW
Mayfield Law Ltd, Suite 8, Thorne Business Park, Forge Hill, Bethersden, Ashford, Kent, TN26 3AF
Hardmans, 4-6 Park Street, Deal, Kent, CT14 6AQ
Brachers LLP, Innovation House, Discovery Park, Ramsgate Road, Sandwich, Kent
Stephens & Son LLP, Rome House, 41 Railway Street, Chatham, Kent, ME4 4RP
Emerald Solicitors, The Old Court House, 1 The Paddock, Chatham, ME4 4RE
Mediate in Maidstone
Kennedys Law LLP, Victoria Court, 17-21 Ashford Road, Maidstone, Kent, ME14 5FA
Jarmans Solicitors, Third Floor, Bell House, Bell Road, Sittingbourne, Kent
Cripps LLP, Wallside House, 12 Mount Ephraim Road, Tunbridge Wells, Kent
Thomashaywood Ltd, 55 Calverley Road, Tunbridge Wells, Kent
Richard Wilson Solicitors Ltd, 15 St Lawrence Avenue, Bidborough, Tunbridge Wells, Kent
Unknown family respondent

Appendix B- Questionnaire



Research Intern Project R22 – Hasan Jacob Sadik

The law school at Canterbury Christ Church University is currently seeking to engage with legal service providers to gather data in order to gauge their approach to mediation.

It is anticipated that the data gathered will help inform the undergraduate taught law curriculum for which we welcome the views of Kent-based legal professionals.

Thank you for participating in the research questionnaire.

- 1) What area of practice are you in?

Family	Civil and Commercial
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- 2) Do you know how mediation works? If so, what do you understand the process to be?

- 3) Would you say there is an increased emphasis on the use of mediation?

Agree	Unsure	Disagree
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- 4) Are there any advantages you consider mediation to possess in comparison to other forms of dispute resolution or litigation?

- 5) Are there any disadvantages you consider mediation to possess in comparison to other forms of dispute resolution or litigation?

6) How does the firm view the process of mediation?

7) Does the firm use any internal or external mediation service providers?

*If external what criteria do you use to select the mediator? I.e. are they local?
Does the mediator have legal expertise or general expertise? Is it dependent on
the complexity of the case or the value of the case? Does it depend on the type of
dispute? Is it dependent on the fees of the mediator?*

8) What are your personal views on mediation?

9) Do you have any experience with mediation?

10) Have you recommended cases to be taken to mediation, excluding MIAMs?

IF yes, how many cases have been referred in the past 12 months?

11) Can you explain why you have previously recommended using mediation?

12) Can you explain why you have not previously recommended using mediation?

13) Was mediation taken up by the clients after it was recommended?

If not why not?

14) Of those clients that have taken up mediation, did any provide an indication of whether it was a positive or negative experience? If so, what was the reason for their view?

Appendix C- SurveyMonkey Questionnaire

Appendix D- The Canterbury Report